In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 49.

LOCAL 24 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, AND KENNETH BURKE, President and Business Agent of Local 24,

Petitioners,

vs.

REVEL OLIVER and A. C. E. TRANSPORTATION COMPANY, INC., and INTERSTATE TRUCK SERVICE, INC.,

Respondents.

On Writ of Certiorari
To the Supreme Court of Ohio and the
Court of Appeals of the State of Ohio,
Ninth Judicial District.

BRIEF FOR RESPONDENTS A. C. E. TRANSPORTATION COMPANY, INC., AND INTERSTATE TRUCK SERVICE, INC.

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STATEMENT OF FACTS.

This case arose on a petition filed by Respondent Revel Oliver, the owner of motor vehicles of the type ordinarily used in the transportation of freight in commerce. Respondent Oliver is one of thousands of such owners who are engaged in the business of leasing their vehicles to common and contract carriers who operate pursuant to authority granted by the Interstate Commerce Commission and the Public Utilities Commission of Ohio.

Generally, as in the case at issue, the lease requires the owner of the equipment to furnish the driver and perform the transportation service for the lessee carrier, with the result that the relationship is that of employer and independent contractor. There are many other types of arrangements in the industry. In some cases the arrangement is simply a lease of the equipment and the carrier hires his own driver and supervises the operation of the equipment. In every case the owner of the equipment is performing an independent business function, at least insofar as the lease of the equipment is concerned, which function is part and parcel of our free enterprise system.

The Supreme Court has heretofore commented on its obligation to protect this small businessman. See the following from the majority opinion in *Teamsters Union Local 309 vs. Hanke*, 339 U. S. 470, 475:

> "These two cases emphasize the nature of a problem that is presented by our duty of sitting in judgment on a State's judgment in striking the balance that has to be struck when a State decides not to keep hands off these industrial contests. Here we have a glaring instance of the interplay of competing social-economic interests and viewpoints. Unions obviously are concerned not to have union standards undermined by non-union shops. This interest penetrates into self-employer shops. On the other hand, some of our profoundest thinkers from Jefferson to Brandeis have stressed the importance to a democratic society of encouraging self-employer economic units as a counter-movement to what are deemed to be the dangers inherent in excessive concentration of economic power. 'There is a widespread belief * * * that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men; * * * and that only through participation by the many in the responsibili-

ties and determinations of business, can Americans secure the moral and intellectual development which is essential to the maintenance of liberty.' Mr. Justice Brandeis, dissenting in *Liggett Co. vs. Lee*, 288 U. S. 517, 541, 580, 77 L. Ed. 929, 940, 961, 53 S. Ct. 481, 85 A. L. R. 699."

The purpose of the action is to determine whether or not the petitioning union and the respondent carriers have a right to enter into a contract, the terms of which are identical for all carriers and teamster-affiliated unions within the entire State of Ohio, fixing the terms by which persons such as the Respondent Oliver may lease equipment to common and contract carriers, parties to the union agreement.

Respondent Oliver bases his claim that the unions and the carriers have no right to contract with respect to the lease of equipment upon the Valentine Act of Ohio, Revised Code, Section 1331.01, in that such contracts tend to restrict trade and to create a monopoly in the business of leasing equipment.

The petitioners have variously claimed that the jurisdiction is in the National Labor Relations Board; that if any violation exists, it is of the Federal anti-trust laws, rather than the state; and that the matter is concerned with a legitimate objective of collective bargaining contracts between employer and employee.

The Ohio Court of Appeals, as affirmed by the Supreme Court of Ohio, found the following facts to be true:

1. That at the time the petitioners and respondent carriers executed the labor agreement, of which Article XXXII was a part, Respondent Oliver and respondent carriers had in effect a lease covering the same subject matter.

2. Respondent Oliver was an independent contractor.

3. The subject matter of Article XXXII was not within the permitted or protected activities of the L. M. R. A.

4. Article XXXII is in direct conflict with Section 1331.01 of the Revised Code of Ohio, which is the state anti-trust law.

5. Respondent Oliver will be damaged in the event Article XXXII becomes effective.

6. The National Labor Relations Board has no jurisdiction to give Respondent Oliver any relief.

7. The courts of Ohio have jurisdiction.

8. The courts of Ohio have a duty to restrain the enforcement of Article XXXII.

QUESTION.

The position of no two parties in a law suit could be further apart than are those of the petitioners and respondents in this case. Respondents deny that even the question exists as it is stated by the petitioners. Petitioners' question is based upon the premise that both the National Labor Relations Board and the Interstate Commerce Commission have jurisdiction to the exclusion of the state courts. (Petitioners' brief, page 2.) This very premise of the petitioners demonstrates the weakness of their position since these two federally constituted boards do not have concurrent jurisdiction in any matter. Their jurisdiction is mutually exclusive. The one has jurisdiction over the relations between a carrier (as an employer engaged in interstate commerce) and its employees. The other has jurisdiction over questions arising with respect to a carrier's relations to the public, insofar as service and

charges are concerned, and in their relations with each other. It is therefore utterly impossible for both agencies to have jurisdiction over the question involved in this case, and the very argument that both do have jurisdiction is an expression of weakness in the position of the petitioners.

Petitioners further attempt to beg the real question involved by making the assumption in their statement of the question that Respondent Oliver is an employee because in the Teamsters' contract he is expressly made an employee. This assumption of status is made in spite of the findings of both trial courts in Ohio and by the National Labor Relations Board in a related case that Respondent Oliver is not an employee. There is no question but that if Respondent Oliver in his capacity of lessor of equipment is determined to be an employee, then the National Labor Relations Board has jurisdiction and the state court does not. The very issue determined by the state court was that in the leasing of heavy over-the-road equipment Respondent Oliver was an independent contractor, that is to say, an independent, responsible businessman, and that therefore the Teamsters Union and the carriers had no right to bargain over the terms of lease where such bargaining was so extensive as to be a violation of the Ohio state anti-trust laws.

Therefore, the true question involved in this case is whether or not a labor union has a federally protected right to contract with an employer for the terms of lease of motor vehicles leased by trucking companies authorized to serve the public by franchise issued by the State of Ohio, as well as the Interstate Commerce Commission, which terms have universal application between all lessors and all lessees in the State of Ohio. This was the question decided by the Common Pleas Court (Record 168) and by the three-judge appellate trial court (R. 238).

ARGUMENT.

Section 2(3) of the National Labor Relations Act specifically exempts an independent contractor from the coverage of the Act. That is to say, they have no rights, no protection and no status at all under the employee provisions of the Act and their coverage is only as an employer.

In a practical sense an independent contractor is an independent entrepreneur and unless a one-man operation is involved, such a businessman is ordinarily an employer and, as such, would be included within the definitions of an employer. (Section 2(2) NLRA.)

Respondent Oliver's lease with Respondent A. C. E. Transportation Company, Inc. (Exhibit 4, R. 147) specifically provides that Oliver's status shall be that of an independent contractor. His testimony concerning his relations with the carrier and his method of operations (commencing R. 53) confirms this relationship. The trial court (R. 173) found him so to be and the three-judge appellate court which tries the matter de novo in Ohio, confirmed the findings of the trial court (R. 246).

It is interesting to note that following the injunction granted by the trial court the Respondent Teamsters Union did finally undertake to exercise its rights under the federal law to organize the employees of the Lessors of equipment (R. 233). In their zeal to obtain a contract with Oliver, the Teamsters Union picketed the premises of A. C. E. Transportation Company, Inc. as well as those of its Lessors. This action resulted in unfair labor charges by both employers, that is to say, Respondent A. C. E. and the Lessors. The National Labor Relations Board's opinion, based on the charges, is reported at 120 NLRB 150. The Board found that the Lessors to A. C. E. were independent contractors, independent businessmen, and

that the picketing had been unlawful. It is further interesting to note that in its opinion the Labor Board itself determined that the contract between these respondents and the relationship thereby created must be interpreted according to state law. We quote from the Board's opinion:

> "It (the lease) provides that the 'relationship herein created is that of an independent contractor and not that of employer and employee,' and that the contract is to be interpreted according to State law. The 11 Lessors involved leased between 2 and 19 tractors, each constituting a capital investment of between $6,500 and $13,000, to ACE; a majority never drive a tractor. The annual revenues from these leasing arrangements ranged from $18,500 to $300,000. A mere recital of these factors should have sufficed to establish, ending the matter, that the lessor-owners are 'independent contractors,' depending 'for their income not upon wages but upon the difference between what they pay for goods, materials, and labor and what they receive from the end result, that is upon profits.' The Supreme Court's and the Board's criteria for determining the existence of an 'independent contractor' relation requires consideration of '*the total situation, including* the risk undertaken, the control exercised, the opportunity for profit from sound management.' * * *
>
> "The conclusion that neither ACE nor the Lessors were 'neutral or wholly unconcerned third parties' in the Unions' dispute with any of them disregards both the purpose and language of Section 8(b)(4)(A) and (B) and long-established and judicially-approved law concerning the protections afforded 'independent contractors' as employers."

The Board's finding is as follows:

> "We find that all of the Respondents induced the employees of ACE and various Lessors to strike with an object of forcing ACE to cease doing business with

other lessors in order to force each of the latter Lessors to recognize Local No. 24 as the representative of his employees, notwithstanding the fact that Local No. 24 had not been certified as the representative of such employees, and that the Respondents thereby violated Section 8(b)(4)(A) and (B)."

Congress, by the passage of the National Labor Relations Act has not pre-empted exclusive jurisdiction to interpret contracts between two employers of labor, such as our other respondents in this case.

We raise the further question that since the National Labor Relations Act gives the Board no jurisdiction whatsoever to interpret or enforce contracts entered into between employers and employees, that state courts have jurisdiction along with the federal courts to interpret such an agreement. The only jurisdiction that the Labor Board has over contracts is to determine whether or not a particular subject is a proper one for bargaining when one party to the negotiations accuses the other of refusing to bargain and files a complaint with the Board.

It is, therefore, Respondents' position that the union and the carriers, in contracting for the terms of lease of tractors and trailers used in the transportation of freight, have exceeded their protected rights and that the state courts have jurisdiction to determine the enforceability of such contracts and their legality under state law where that question has been raised properly in a state court having jurisdiction of the parties.

SUPREME COURT'S RESPONSIBILITY.

It is the Supreme Court's duty and responsibility to protect the constitutional rights of litigants appealing to it. It also has the responsibility of defining lines of demarcation around the fields of regulations constitutionally assumed by the Congress of the United States and assigned

to a particular federal board, and also properly to protect the field of regulation properly retained and assumed by the several states.

The courts of Ohio have found in this case that the union has undertaken to bargain in a field not pre-empted by Congress and not protected by Congress. It is a field in which the activities of the parties may properly be scrutinized by the state courts and therefore regulated by state law. Having assumed this responsibility, the courts of Ohio have condemned the result of that particular part of the bargaining in an unprotected area.

The Court will note that by journal entry the courts of Ohio have made it clear that the entire contract negotiated by the union and the carriers which properly covered the relations between the employers and their employees was permitted to become effective, and only that part which improperly and unlawfully fixed the terms of lease for tractors and trailers owned by third persons and leased to the carriers was very meticulously taken out of the contract and condemned (R. 14).

The petitioners have persisted in reciting the Supreme Court's decision in *NLRB vs. Hearst Publications*, 322 U. S. 111, and still persist (petitioners' brief 37 and 40) in citing that case in support of their claim that the National Labor Relations Board has authority to make an original finding on this question of whether or not a particular individual is an employee of an independent contractor.

It is respondents' position that a court having jurisdiction over the parties and the issue involved in a particular suit has the necessary authority to determine factual questions raised in deciding the issue presented. It should be noted that at the time the *Hearst Publications* case was decided the Wagner Act did not expressly exclude independent contractors from the protection afforded em-

ployees but at that time, generally speaking, independent contractors were treated as employers and as a matter of law were excluded.

In the *Hearst* case the Board had used an interpretation of independent contractor which strained the normal common law definition and the Supreme Court affirmed its decision upon the theory that the Board had "expert knowledge" of what was expected of it in interpreting the Act as it was then in effect.

In amending the Wagner Act by the passage of the Taft-Hartley Act, Congress purposely exempted independent contractors from the definition of employees in order to reject the result of the *Hearst Publications* case and to make it definite that the common law definition should prevail. (See House of Representatives Conference Report 245 at page 24 of this brief and Report 510 at page 23 of this brief.)

The National Labor Relations Board considered the specific exclusion of independent contractors from the definition of employees in the first case to appear before it after the amendment of the Act with the following statement:

> "The amended Act, as already noted, specifically excludes 'independent contractors' from the category of 'employees.' The legislative history, in this connection, shows that Congress intended that the Board recognize as 'employees' those who 'work for wages or salaries under direct supervision,' and as 'independent contractors,' those who 'undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials and labor and what they receive for the end result, that is, upon profit.'"
>
> *Kansas City Star Co.* (1948), 76 NLRB 384.

Therefore, in applying the common law rules to the definition of independent contractor to the determination of the status of Respondent Oliver, the courts of Ohio were applying the common law rules desired by the United States Congress and recognized by the National Labor Relations Board. Fortunately, the court has the benefit of knowing that when the identical question was presented to the Board an identical result was reached. See 120 NLRB 150, *Local 24, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, and its agents, Kenneth L. Burke, et al., and A. C. E. Transportation Company, Inc., et al.*, being two of the same parties involved in the within case.

It has not been the Supreme Court's policy to disturb the findings of state courts unless clearly erroneous and where the review of facts is necessary for the determina- of the federal question. Generally speaking, the court has confined itself to the application of the federal question to the findings made by the lower court. This is particularly true where the facts have been concurred in by two trial courts. See 54 *A. J.* 860 (United States Courts, paragraph 226):

> "The inclination of the Supreme Court to accept the findings of the lower court on disputed facts is, of course, stronger in case of concurrent findings by lower courts. Findings of that character will usually not be disturbed where they have substantial support in the evidence, whether they are the findings of Federal courts or of state courts. A like conclusiveness may be given to concurrent findings in a suit in equity."

and cases cited. See also on the subject case note appearing at 49 L. Ed. 546, *Aetna Life Insurance Co. v. Dunken*, 266 U. S. 389, 69 L. Ed. 342 (Syllabus 2); *Marcos vs. Wilson*

Cypress Co., 269 U. S. 82, 70 L. Ed. 172 (Syllabus 5); *Allen vs. Trust Co.*, 326 U. S. 630, 90 L. Ed. 367 (Syllabus 5); *Lustig vs. United States*, 338 U. S. 74, 93 L. Ed. 1918 (Syllabus 1); *Fry Roofing Co. vs. Wood*, 344 U. S. 157, 97 L. Ed. 168 (Syllabus 1); *Stein vs. People*, 346 U. S. 156, 97 L. Ed. 1522. In the latter case the court had the following to say:

> "It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court."

Respondents admit, and it is no longer debatable that the Supreme Court has the duty and responsibility of reviewing the findings of lower courts to determine the constitutionality of the application of federal law to the facts at issue, but we respectfully submit that the state courts' finding that Respondent Oliver was an independent contractor was based upon substantial evidence and that factual determination should not be inquired into or disturbed in this Court.

JURISDICTION AS CONTROLLED BY FEDERAL LABOR LEGISLATION.

The Congress of the United States has not pre-empted the field of labor relations. Through the enactment of the Norris-LaGuardia Act, the National Labor Relations Act and the Labor Management Relations Act, as these Acts have been amended, the jurisdiction of the Federal courts has been delimited and the National Labor Relations Board has been created with certain enumerated broad, but limited, powers to regulate labor relations.

Since the Federal Acts have enumerated certain powers of the courts and boards, there is a great area beyond the enumerated powers which the Federal authority does not reach. The area which is not reached by the Federal regulations remains within the jurisdiction of state courts and, where they have been created, state boards. Any other view of the jurisdictional question as it affects labor relations would result in a denial of due process in those areas where the Federal board has no jurisdiction. (*Amalgamated Meat Cutters vs. Fairlawn Meats*, 353 U. S. 20, involves a no man's land created, not by lack of jurisdiction, but by a failure to assume jurisdiction by reason of an arbitrary minimum rule set up by the National Labor Relations Board.)

The Federal legislation has also been directed toward the regulation of labor disputes and the prevention of certain activities which have been designated unfair labor practices. For the purpose of the Federal legislation, a labor dispute is much broader, for example, under the Norrris-LaGuardia Act than it is under the two Acts providing for the regulation of labor relations by the National Labor Relations Board. An unfair labor practice is not such an activity as a court might feel to be unfair. It is only such acts as have been declared to be such in the L. M. R. A.

The case of *Garner vs. Teamsters Union*, 346 U. S. 485, 98 L. Ed. 228, is regarded by all persons as the leading case on the question of the conflict of jurisdiction. A close reading of the reported case, together with the subsequent cases on the subject by the same court, will clearly indicate that while this case is still a leading case on the subject and while it may have pinpointed a particular issue, it actually was based on prior decisions of the court,

expressed no new law, and will probably be recognized one day as a landmark in fixing the limitations on the jurisdiction of the Federal boards and courts in labor matters, rather than a case which enlarged that jurisdiction.

The situation involved in the *Garner* case is simple. The union, in an attempt to organize the employees of the plaintiff, established a picket line to advertise to the public that such employees were not members of the union and that the employer was considered unfair by reason thereof. Few, if any, of the employees were members of the union. The Supreme Court of the United States affirmed the Supreme Court of Pennsylvania in its decision that such activity was a violation of the National Labor Relations Act, that the jurisdiction to prevent such unlawful activity resided in the National Labor Relations Board, and that, therefore, the State courts had no jurisdiction to hear and determine the controversy. This case cannot properly be understood until it is very definitely recognized that it was based upon the fact that there was positive jurisdiction in the Board to grant a remedy. The nubbin of the decision is that since the Federal jurisdiction, where applicable, is supreme, and where a remedy is granted by the Federal courts and boards, the State cannot also grant a remedy for the same identical wrong. In expressing this statement, the court in positive language stated that where there was no conflict in remedy, the state jurisdiction remained intact. We quote the following paragraphs from the decision on the foregoing proposition:

> "The National Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible * * * (page 488).

"Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to parts of the Pennsylvania statute, it has forbidden labor unions to exert certain types of coercion on employees * * * (page 488).

"* * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal board, precludes state courts from doing so. Cf. *Myers vs. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459; *Amalgamated Utility Workers vs. Consolidated Edison Co.*, 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561 * * * (page 490).

"* * * *The conflict lies in remedies, not rights.* The same picketing may injure both public and private rights. *But when two separate remedies are brought to bear on the same activity, a conflict is imminent* * * * (Emphasis added) * * * (page 498).

"On the basis of the allegations, the petitioners could have presented this grievance to the National Labor Relations Board. The respondents were subject to being summoned before that body to justify their conduct. We think the grievance was not subject to litigation in the tribunals of the State" (page 501).

The decision in the *Garner* case raised such a hue and cry that the Supreme Court in several decisions thereafter explained what they had said in that case. It caused a lot of people to go back and re-examine the decision in its entirety, and we think most persons then agreed that the *Garner* case had not been the momentous decision that had originally been thought.

We cite from one of the later Supreme Court cases in which the court explained the rule which they had intended to express in the *Garner* case: *United Construction Workers vs. Laburnum Construction Corp.*, 347 U. S. 656, 98 L. Ed. 1025. In this case a suit for damages for breach of contract was filed in the Virginia State Court for alleged violation of a labor agreement. There was no question but what the employer was engaged in interstate commerce. A judgment was awarded to the employer, which judgment was affirmed on appeal by the Supreme Court of Virginia and by the United States Supreme Court. The Supreme Court's review of the case was limited solely to the question of jurisdiction (see 347 U. S. 658). We quote the following from the court's opinion on page 663:

> "* * * In the Garner Case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation * * *."

and at page 665:

> "* * * To the extent that Congress prescribed preventive procedure against unfair labor practices, that case (the Garner case) recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the Garner case to demonstrate

the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived."

The jurisdictional rule, as expressed by the Supreme Court, is demonstrated in the case of *NLRB vs. Swift & Co.*, decided by the United States District Court and reported at 130 F. S. 214, affirmed and modified at 233 F. 2 226. The Appellate Court held that the district court had no jurisdiction to consider an injunction of the state court in this matter. Swift & Co., an interstate employer, had filed a complaint with the National Labor Relations Board and alleged a specific violation of the NLRA. The NLRB and its general counsel refused to issue a complaint and the matter was dismissed by the Board. The employer then sought an injunction against the allegedly illegal picketing from the State Court of Missouri. The Board then filed an action in the Federal District Court to enjoin the State court. The decision which we refer to is the denial by the District Court of the petition of the Board for this injunction. The employer in the State court not only alleged that it was engaged in interstate commerce, but alleged that the picketing violated both the Federal, as well as the State law. The court points out that the instant case is the exact opposite of the *Garner* case, and we quote from the case:

"However, in the Garner case there was no attempt to invoke the jurisdiction of the Board. Here we have just the opposite situation. Respondent Swift has filed unfair labor practice charges with the Board, and the one concerning the picketing at the company plant has been dismissed by the regional director and the ruling approved on appeal by the General Counsel of the Board."

The court pointed out that the Supreme Court had stated that much was left to the jurisdiction of state courts and that to deny an employer resort to a remedy before any tribunal would be a denial of due process; that the General Counsel of the Board could not take the position that a litigant should be denied any remedy whatsoever (page 88,852):

> "* * * In effect, the General Counsel of the Board is contending not that there is a conflict of remedies, but that there should be no remedy whatsoever. Having in mind the language of the Garner case that the manner in which the matter is decided does not destroy the potentialities of conflict where a conflict exists, it is clear in this case that no conflict can arise when the road to an adjudication by the Labor Board is thus blocked. To hold otherwise would deny the respondent due process of law."

The conflict between state and federal jurisdiction was at issue in a more recent case, and again the import of the *Garner* case was discussed by the Supreme Court. See *International Association of Machinists vs. Gonzales*, 356 U. S. 617, 2 L. Ed. 2 1018, in which the Supreme Court approved the exercise of jurisdiction by a state court in awarding damages and reinstating to membership in a union a member who had been improperly expelled from membership. We quote:

> "* * * As *Garner vs. Teamsters C. & H. Local Union*, 346 U. S. 485, 98 L. ed. 228, 74 S. Ct. 161, could not avoid deciding, the Taft-Hartley Act undoubtedly carries implications of exclusive federal authority. Congress withdrew from the States much that had theretofore rested with them. But the other half of what was pronounced in Garner—that the Act 'leaves much to the states,'—is no less important. See 346 U. S. at 488. * * *

"Since we deal with implications to be drawn from the Taft-Hartley Act for the avoidance of conflicts between enforcement of federal policy by the National Labor Relations Board and the exertion of state power, it might be abstractly jurifiable, as a matter of wooden logic, to suggest that an action in a state court by a member of a union for restoration of his membership rights is precluded. In such a suit there may be embedded circumstances that could constitute an unfair labor practice under paragraph 8 (b) (2) of the Act. In the judgment of the Board, expulsion from a union, taken in connection with other circumstances established in a particular case, might constitute an attempt to cause an employer to 'discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *.' 61 Stat. 141, 29 USC 158 (b) (2). But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. * * *

"* * * The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. * * *

"* * * In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member * * *."

The jurisdictional question was presented to the Court of Appeals in California in the case of *Colgate-Palmolive-Peet Co. vs. Warehouse Union Local 6*, 282 P. 2

1015, 28 LC 69,280. The question arose on the cross-petition by the union for damages for breach of contract. Normally, the refusal to bargain by either party would be an unfair labor practice as defined in the National Labor Relations Act. In this particular situation there was a contract between the parties which required bargaining on a certain issue. The union chose to sue for breach of this contract to bargain, rather than to file a complaint with the Board. The court held that it had jurisdiction since the union had chosen to avail itself of its remedy of an action for damages for breach of contract, even though it could have availed itself of its right to file a complaint with the National Labor Relations Board. In other words, the union had chosen to avail itself of a remedy which was not in fact in conflict with the exclusive remedy granted by the Board.

Ohio courts have recognized their rights to grant relief in cases where there is no conflict in the remedy offered by its system compared with that offered by the Federal system. See *General Electric Co. vs. UAW*, 64 O. L. A. 231.

The Court will note that in the present circumstance the contract was negotiated and entered into without a strike. As we have pointed out, it is respondents' position that a contract once entered into is subject solely to the jurisdiction of the legally established courts for its interpretation and enforcement, there being no jurisdiction in any federal board, particularly in the National Labor Relations Board, to either enforce or interpret the contract.

This issue was presented to this Court in *Textile Workers vs. Lincoln Mills*, 353 U. S. ____, 1 L. Ed. 2 972. On this point we quote the following from the court's opinion:

"The bills, as they passed the House and the Senate, contained provisions which would have made the failure to abide by an agreement to arbitrate an unfair labor practice. S Rep. No. 105, 80th Cong. 1st Sess., pp. 20, 21, 23; HR Rep. No. 245, 80th Cong. 1st Sess., p. 21. This feature of the law was dropped in Conference. As the Conferences Report stated, 'Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' H Conf. Rep. No. 510, 80th Cong. 1st Sess., p. 42."

For a portion of the debate on this subject at the time of the passage of the Act, we again quote from the court's opinion:

"Mr. Barden * * * 'It is my understanding that section 302, the section dealing with equal responsibility under collective bargaining contracts in strike actions and proceedings in district courts contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; in other words, proceedings could, for example, be brought by the employers, the labor organizations, or interested individual employees under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract. * * *'

"Mr. Hartley. 'The interpretation the gentleman has just given of that section is absolutely correct.' 94 Cong. Rec. 3656-3657."

See also *Standard Oil Co. vs. Oil, Chemical & Atomic Workers Int. Union*, 76 O. L. A. 266, wherein the court made the following observation:

"As a matter of fact, research shows that the Congressional Committee, handling the Taft-Hartley Act on

this question of enforcement of contracts said this, and I quote from their Committee report:

" 'Once parties have made a collective bargaining contract the enforcement of the contract should be left to the usual processes of the law and not to the National Labor Relations Board.' " (page 275.)

Also see *Commonwealth vs. McHugh*, 326 Mass. 249, 93 N. E. 2, 751, more fully described hereafter in our brief.

NO CONFLICT OF REMEDY.

Any remedy which the Federal jurisdiction can possibly grant in this situation which would be in conflict with that granted by the courts of the State of Ohio, would be contained in the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, otherwise referred to as the Taft-Hartley Act, Title 29 U. S. C. 151-168.

We have pointed out that Respondent Oliver brings this action as the lessor of motor vehicles to common or contract carriers. As such, he is an independent contractor. This is so, even though in some other capacity he may own and operate another business, or may be employed by some employer, which employer may or may not be the lessee of his motor vehicles. The NLRA governs the relationship between employees and employers. Section 2(3) of the Act defines the word "employee" and very specifically provides that such definition shall not include "or any individual having the status of an independent contractor." *The trial court has determined that Respondent Oliver is an independent contractor and, as such, does not have the status of employee under the Act.* Therefore, there would be no jurisdiction in the National Labor Relations Board whatsoever to consider any disputes which he might have as such independent contractor

with any party who should lease his equipment, or with any union which might have an interest in the lease of such equipment. This is so since Section 7, which defines the rights of employees, and Section 8, which defines both employer and union unfair labor practices, are limited to defining and protecting the rights of "employees."

The petitioners, at page 8 of their brief, cite the case of *NLRB vs. Hearst Publications*, 322 U. S. 111, as being a declaration by this Court that, for uniformity, the Board has jurisdiction to hear the facts and make a determination as to whether an individual is an employee or an independent contractor. This is not the case for at least two reasons. First, this is an anti-trust case involving the legality of a written contract, a situation over which the National Labor Relations Board has no jurisdiction whatsoever. The courts of Ohio have jurisdiction to enforce their Anti-Trust Act and, necessarily, have jurisdiction to determine all questions involved in such an action. See page 44, *infra*, of this brief where this subject is more fully discussed. Second, the intent of Congress in passing the Taft-Hartley Act on this question was to alter the rule expressed by this Court in the *Hearst* case and to have the question of whether or not an individual is an independent contractor settled by local law. See House of Representatives Conference Report No. 510, page 5:

> "(D) The House bill excluded from the definition of 'employee' any individuals having the status of independent contractors. Although independent contractors can in no sense be considered to be employees, the Supreme Court in *N. L. R. B. vs. Hearst Publications, Inc.* (1944), 322 U. S. 111, held that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were 'employees' within the meaning of the Labor Act. Consequently it re-

fused to consider the question of whether certain categories of persons whom the Board had deemed to be 'employees' were not in fact and in law really independent contractors."

and at page 6:

"(D) The conference agreement follows the House bill in the matter of persons having the status of independent contractors."

and see also the following comment on Section 2(3) of the Taft-Hartley Act from the Report of the 80th Congress, first session, No. 245, page 18:

"(D) An 'employee,' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board vs. Hearst Publications, Inc.* (322 U. S. 111 (1944)), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees.' The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' 'Employees' work for wages or salaries under direct supervision. 'Inde-

pendent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee.' "

Section 7 of the Act provides that employees shall have the right to organize or to refrain from such activity, and is here mentioned because it is this right which is protected by much of the language of Section 8. No rights protected by Section 7 are involved.

Section 8 is the real heart of the Act in that it defines what shall be unfair labor practices by an employer (Section 8(a)) and those which are unfair for a labor organization (Section 8(b)). There can be no jurisdiction in the National Labor Relations Board unless some claim can be made that an unfair labor practice, or a protected activity, is involved.

The provisions of Section 8(a) must be examined to determine whether or not an employer is guilty of an unfair labor practice. Without prejudice to the claim of Respondent Oliver that he is an independent contractor and not an employee covered by the Act, we should examine this section to determine whether he could make any claim to the Board with respect to the activities of the

respondent carriers in signing the contract which is at issue in the pending case.

Section 8(a)(1) provides that an employer shall not interfere with an employee in the exercise of the rights guaranteed in Section 7, which, we have seen, is his right to join or not to join a labor organization. The provisions of this section are not involved in this case.

Section 8(a)(2) provides that an employer shall not interfere with the formation of a labor organization. There is no issue involved in this case concerning this section.

Section 8(a)(3) prohibits employers from encouraging or discouraging membership in any labor organization. There can be no issue raised under this section, since Respondent Oliver is a member of the petitioning union and the other parties, i.e., the petitioning union and respondent carriers, have for some years entered into labor agreements for the employees of the respondent carriers.

Section 8(a)(4) provides that an employer shall not discriminate against an employee for giving testimony for filing charges under the Act. There has been no violation of this section.

Section 8(a)(5) provides that an employer shall not refuse to bargain collectively with employee representatives. The claim in this case is not that they have refused to bargain, but that they have bargained over matters not the proper subject of a labor contract and to the extent that it is monopolistic. There has been no violation of this section.

These are all of the matters which could be claimed to be unfair practices by employers, i.e., the defendant carriers, and none are applicable. There would, therefore, be no jurisdiction in the NLRB to consider any claim made by Respondent Oliver against the respondent carriers.

Section 8(b) provides for unfair labor practices by labor organizations, i.e., the petitioning union. We shall now consider them paragraph by paragraph.

Section 8(b)(1) provides that labor organizations shall not interfere with an employee's right as guaranteed in Section 7, which is the counter-part of Section 8(a)(1), and refers to an employee's right to join or refrain from joining a labor union. There is no issue involving a violation of this section.

Section 8(b)(2) makes it an unfair labor practice for a union to cause an employer to discriminate against an employee in violation of Section 8(a)(3), the effect of which is to prohibit a union from causing an employer to discriminate against an employee to encourage or discourage membership in a labor organization. There is no claim that the petitioning union has violated this section.

Section 8(b)(3) is the counter-part of Section 8(a)(5) and makes it an unfair labor practice for a union to refuse to bargain with an employer. There is no claim that the petitioning union has refused to bargain.

Section 8(b)(4) makes it an unfair labor practice for a union to induce or encourage employees to engage in a strike where an object is certain enumerated, forbidden practices. For our present discussion, the importance of this section is in the use of the word "strike," rather than in the prohibited practices. Without a strike, there has been no violation of this section. In other words, if the union can accomplish any of the prohibited provisions of this section without inducing or encouraging the employees to engage in a strike, there has been no violation of the section. The contract which is at issue in the within case was voluntarily signed by the respondent carriers and the petitioning union, as indicated by all of the testi-

mony in the case. There being no strike there was no violation of this particular section of the Act.

Section 8(b)(5) prohibits unions from requiring employees to pay excessive initiation fees. There has been no violation of this section claimed.

Section 8(b)(6) forbids the union to require featherbedding. There is no claim of violation of this section.

The foregoing has been a general discussion of every action which has been defined as an unfair labor practice on behalf of labor unions. Not one is in issue in the present case and it goes without saying that the Board would have no jurisdiction unless one had been at issue.

All of the unfair labor practices as defined by the Act affecting either the employer or the employee, are self-explanatory except, possibly, the requirement of Section 8(b)(4) that there be a strike to enforce the enumerated unlawful practices. The citation of a minimum amount of authority will explain this provision. This particular section was at issue in *Douds vs. Sheet Metal Workers Local Union No. 28,* 101 F. S. 970, and we quote from page 972 of the report:

> "* * * Whatever objections can be taken to such agreement as being contrary to law, it cannot be regarded as a violation of Section 8(b)(4)(A), because the evidence fails to show that the respondent, in achieving its objective, induced or encouraged the employees of any employer to engage in an unfair labor practice as defined therein."

The proposition is demonstrated by a converse set of facts in *Aetna Freight Lines vs. Clayton,* decided by the United States Circuit Court of Appeals and reported at 228 F. 2 384. This case will be discussed in full in a later section of this brief. At this point we merely want to point out that one of the reasons an injunction issued by the

Federal court was dismissed on appeal was that Section 8(b)(4) was involved and there was a strike in progress which made it an unfair labor practice, giving original jurisdiction to the Board, rather than to the Federal court.

We have heretofore in this brief discussed the jurisdictional question as it was raised in the *Colgate Palmolive-Peet* case, 282 Pac. 2 1015, pages 19-20 *supra*. The decision in that case is germane to the present discussion as respects the point that since the question, as raised by the union, did not involve an unfair labor practice charge, it was proper to bring it in the State court of California. From the discussion of that case it will be recalled that had the union chosen to take advantage of the employer's unfair labor practice, it could have filed a complaint with the Board.

The National Labor Relations Board had found various unions guilty of unfair practices in their efforts to require an employer to discriminate against non-union labor. In *Denver Building and Construction Trades Council vs. Henry Shore*, 287 Pac. 2 267 (Colo.), the employer sued the unions for damages by reason of the unfair practices previously litigated before the Labor Board. These same unfair practices had been proscribed in the collective bargaining contract, so that the same action which had been held contrary to law was also contrary to the terms of the bargaining agreement. The State court held that since the plaintiff was seeking the remedy through an action for breach of contract, the State court had jurisdiction, even though the employer could have sought to further proceed under the National Labor Relations Board. In other words, the court found that there were two remedies, one under the Board and one under the State law, and that there was no conflict between the two.

Where no unfair labor practice is involved giving jurisdiction of a controversy to the Board, the states retain their right to control the situation. See *Isbrandtsen Co. vs. Schelero*, 118 F. S. 579, wherein a petition for injunction was commenced in a State court, removed to the Federal court and remanded. The cited decision was by the Federal court remanding the case to the State court, and we quote from syllabus three:

> "Courts of state of New York may function in cases of injurious conduct in area comprehending labor relations which National Labor Relations Board is without express power to prevent and which therefore either is governable by state or is entirely ungoverned. Labor Management Relations Act 1947, Para. 1 et seq., 29 U. S. C. A. Para. 141 et seq."

An injunction was granted by the Circuit Court of Hawaii in *Dairymen's Association vs. Hawaii Teamsters Local 996*, 25 LC* 68,307, where the picket line was in violation of a no-strike clause contained in the contract in effect between the union and the employer. The court found that the action was essentially one to prevent a breach of contract, which was not an unfair labor practice as defined by the Act and, hence, there was no conflict in the remedy provided by the Board and the local court.

An injunction was granted in *International Association of Machinists vs. Goff-McNair Motor Co.*, 264 S. W. 2 48, 25 LC 68,135, by the Supreme Court of Arkansas, February 1, 1954, and we quote a syllabus of the case:

> "Even though interstate commerce is affected, the NLRA does not deprive a state court of jurisdiction to enjoin picketing for a purpose which violates state law, provided that the picketing is not an unfair labor practice upon which the NLRB is empowered to act.

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* LC refers to Commerce Clearing House Labor Law Reports, known as "Labor Cases."

Picketing to compel the adoption of a union-security agreement which violates state law is not an unfair labor practice upon which the NLRB is empowered to act. Accordingly, a state court may enjoin such picketing even though interstate commerce is affected."

The only question decided by the state courts below was that the union and carriers bargained on a subject prohibited by the Anti-Trust Laws of Ohio concerning a person and a subject matter over which they had no lawful authority to bargain.

It is respectfully submitted that not one issue has been raised by any party in the within action concerning a violation of the National Labor Relations Act and that therefore the NLRB would have no jurisdiction whatsoever to consider the matters presented to the court by the pleadings and evidence in this case and that therefore the State court has jurisdiction to determine the issue.

APPLICATION OF ANTI-TRUST STATUTES.

The proposition to be established in this section of the brief is the following: Whenever labor unions combine with a non-labor union organization in a manner which violates a State or Federal anti-trust law, they are as liable and guilty for such violation as any non-labor group.

It follows from the above-stated proposition that where such a violation occurs a labor union is subject to all penalties provided in the Act. These penalties, generally, are liability for damages, penal liabilities, action for injunction by either the State or aggrieved private party. In the case of action for injunction in the Federal courts, the provisions of the Norris-LaGuardia Act prohibiting injunction against labor unions are not applicable, since the injunction sought is not concerned with a labor dispute. While we are presently concerned with an alleged violation of the State anti-trust laws by a combination

between employers and a labor union group, the reasoning would be the same if the violation alleged were a violation of the Federal anti-trust law or that of any state. We will, therefore, cite authorities from various jurisdictions, including Federal.

One of the most recent and leading cases upon the illegality of combinations of labor unions and employers is that decided in the case of *Allen Bradley vs. Local Union No. 3*, 325 U. S. 797, 89 L. E. 1939. The evidence disclosed that there had been formed a combination of the manufacturers of electrical equipment in New York City, of the electrical contractors who installed the equipment and the local union which represented the employees of both the manufacturers and the contractors, which required that all electrical equipment installed in New York City must be manufactured locally, which combination resulted in higher profits for the employer group and higher wages for the employee group. The question presented was whether or not, considering the Sherman Anti-Trust Act, the Clayton Act and the Norris-LaGuardia Act, a labor union could be found guilty of violating the Sherman Anti-Trust Act and, if guilty, could an injunction be rendered against the union. The court found that the exemption accorded to labor unions and their members does not give them authority to combine *with other persons* (page 808). The court further decided that the Norris-LaGuardia Act forbade injunctions against labor unions only when the unions combined with other labor groups and not when they combined with non-labor organizations. The Supreme Court, accordingly, upheld the trial court in granting the injunction and reversed the appellate court.

A later pronouncement by the Supreme Court on the same subject was made in *Giboney vs. Empire Storage & Ice Co.*; 336 U. S. 490, 93 L. E. 834. In this case a union was

attempting to organize all ice peddlers in Kansas City, Missouri, "to obtain better wages and working conditions" by requiring all the manufacturers of ice to agree to sell their ice only to delivery men who belonged to the union. The Empire Storage & Ice Co. refused to sign such an agreement, although all of the other manufacturers of ice in the area signed the agreement demanded by the union. The union followed this refusal with a picket line to enforce its demands. An action was brought to enjoin the picketing under the Missouri anti-trust acts in State court. The State courts granted the injunction for the reason that the activity was an illegal combination and contrary to their anti-trust laws and the United States Supreme Court affirmed the decision. It is very interesting to note that in this case the delivery men owned their own trucks, purchased ice as independent business men and made their own deliveries from such trucks. It was the union's position in that case, as it is the union's position in the case now pending, that these trucks were merely the tools of a trade, such as a carpenter's hammer, and that it was necessary to control the price of ice from the manufacturer to the consumer in order to protect their wage and working conditions. This contention was, of course, made by the union in order to establish their position that a labor dispute existed and that the object of the picketing was a lawful objective. In answer to this contention, the Supreme Court had the following to say, at page 496:

> "It is too late in the day to assert, against statutes which forbid combinations of competing companies, that a particular combination was induced by good intentions."

and, further, at page 497:

> "To exalt all labor union conduct in restraint of trade above all state control would greatly reduce the

traditional powers of states over their domestic economy and might conceivably make it impossible for them to enforce their antitrade restraint laws. See Allen Bradley Co. v. Local Union No. 3, I. B. E. W. 325 U. S. 797, 810, 89 L. ed. 1939, 1948, 65 S. Ct. 1533."

and at page 503:

"* * * They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade * * *."

and at page 504:

"While the State of Missouri is not a party in this case, it is plain that the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way * * *. We hold that the state's power to govern in this field is paramount * * *."

A more recent decision is that of *U. S. vs. Employing Plasterers Association of Chicago, et al.*, 347 U. S. 186, 98 L. E. 618, where a criminal complaint was brought by the United States against a combination of plastering contractors and labor unions representing plasterers in Chicago area where the offense was the restrictions against out-of-state contractors or newly formed contractors from doing business in the Chicago area in competition with the older members of the Association. The complaint had been dismissed by the District Court and this decision was reversed by the Supreme Court, holding that the illegal combination did exist and that it could be restrained by the action of the United States government. In this par-

ticular situation the defendants had complained that only the State law was violated since all the activity was centered within the City of Chicago. Under headnote three, the Supreme Court answered this as follows:

> "Where interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act cases."

We feel that the converse would have been true had the complaint been filed by the State of Illinois since very often combinations in restraint of trade, as well as trade, very often has a local, as well as an interstate, effect.

A similar case was at issue in Local 175 of *International Brotherhood of Electrical Workers vs. United States,* 219 F. 2 431, wherein the local electrical contractors had agreed with the union that only one contractor, who would be designated by the group, would submit a low bid on the job and that others would bid pre-arranged, complementary higher bids; that any disagreement as to who should be the low bidder would be referred to a grievance committee; that the union would refuse to supply labor for any contractor who would not go along with the arrangement, with the result that the earnings of the contractors and union members were increased improperly. Such an arrangement was held to be contrary to the Federal Anti-Trust Acts and an injunction was granted by the court. The court very specifically stated that the Clayton Act does not exempt a labor union from the scope of the Sherman Act when the union and its officials aid and abet non-labor groups in violating the Act.

Citing and following the Supreme Court's decision in *Allen Bradley Co. vs. Local Union No. 3, supra,* the court in *Lystad vs. Local Union No. 223,* 135 F. S. 337, held that a bargaining agreement between members of a business

association and a union that union members should service only those coin-operated machines owned by members of the business association affected was an illegal restraint of trade in that it inhibited the sale, in interstate commerce, of a coin-operated machine to a person not a member of the business association.

A situation involving the Teamsters Union was at issue in *Dickson vs. Northeast Texas Motor Freight Lines, Inc.*, 210 S. W. 2, 660, 15 L. C. 64,743. In this particular case, a proviso in the Teamsters Union contract, which was signed by numerous employers, forbidding an employer to instruct his employees to go through a picket line or to handle "unfair" goods was held to violate a Texas statute prohibiting monopolies in conspiracy in restraint of trade, since it is a contractual means of effecting a secondary boycott. The interesting phase of this case as regards the case pending before this Court is that the motor carrier particularly involved in the action was an interstate carrier operating between Texas and Oklahoma pursuant to authority issued by the Interstate Commerce Commission. These facts were carefully pointed out in the court's opinion. The contract, having been entered into in Texas, was held to violate the Texas statute and was illegal, regardless of its interstate effect, since the result of the contractual term was an agreement between a union and a non-union organization to violate the State's anti-trust law.

Two decisions by the Supreme Court of Massachusetts are particularly interesting on the inter-play between Federal and State anti-trust laws. The first case cited does not affect a labor union, but the defense was very strenuously made that the Federal, rather than the State, anti-trust law had been violated. In *Commonwealth vs. Strauss*, 191 Mass. 545, 78 N. E. 136, writ of error dis-

missed without opinion in 207 U. S. 599, 52 L. Ed. 358, 28 S. Ct. 253, an action was brought by the state to enjoin the violation of a Massachusetts statute prohibiting the sale of goods where a condition of the sale is that the purchaser will not sell or deal in a competing article. The Continental Tobacco Co. controlled ninety-five percent of the sale of plug tobacco nationally and eighty percent of that sold locally. Its contracts with dealers prohibited the dealer to sell any competing item. The injunction granted by the trial court was affirmed as a proper exercise of the state's police power. The defense was made that since the contracts had been entered into with dealers nationally, as well as locally, and since the Continental Tobacco Co. was a national organization which controlled ninety-five percent of the sale of the particular type of tobacco, that any violation committed must be a Federal statute, rather than a state statute, since interstate commerce was involved. In answer to this argument, the court made the following statement:

> "This statute does not attempt directly to regulate interstate commerce, or to deal with it in any way. Indirectly it affects it in those cases where contracts are made for the sale and transportation of property in another state to a purchaser in this state. The statute does not purport to tax interstate commerce, or directly to impose any burden upon it. If it did, it would be unconstitutional. Robbins v. Shelby County Taxing District, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719."

and further, in reference to the Federal Anti-Trust Law, the court said:

> "That law deals only with contracts which directly affect interstate or foreign commerce by way of restraint of trade or the creation of a monopoly, and it

does not touch contracts which affect interstate commerce only indirectly."

The second Massachusetts case is on all fours with the case now pending before this Court and on all points in issue. *Commonwealth vs. McHugh*, 326 Mass. 249, 93 N. E. 2 751, is an action by the State of Massachusetts under the state anti-trust law to enjoin a violation by the union representing fishermen and the employers of these fishermen. It seems the fishermen who operated out of Massachusetts received their pay by sharing the proceeds of the catch of fish with the owner of the boat on which they worked. In order to increase the percentage due the fishermen as wages, the union entered into contracts with the owners of the boats which gave the union the right to control the sale of fish. It should be noted that the fish were caught in international waters, transported into the State of Massachusetts and sold both locally and in interstate commerce, so that the question of interstate and foreign commerce was involved, as well as admiralty law. The union involved in the case claimed jurisdiction over fishing along the east coast from the State of Maine south to Virginia. The agreement limited the amount of fish which each man could catch, fixed the minimum price at which fish would be sold, required all fish to be sold through union-controlled selling sheds where all sales were at auction by union-employed auctioneers. Any boat owner who desired to sell his fish privately had to enter into competition in bidding for his own catch and any boat owner who refused to comply was refused the help of fishermen. Any fisherman who refused to comply with the union rules was refused employment. The union's first maneuver was to remove the case to Federal District Court, where it was promptly remanded to the State court in an opinion reported at 71 F. S. 516. The syllabi of the

opinion remanding the case are of particular interest here and are therefore quoted:

> "2. A suit is within federal jurisdiction as arising 'under the Constitution and laws of the United States' only when plaintiff's statement shows that his cause of action is based thereon, and it is not enough that defendant may find in them some ground of defense.
>
> "3. Failure of plaintiff's statement of his cause of action to show that suit arises under constitution and laws of the United States, so as to give federal court jurisdiction, cannot be supplied by any statement in petition for removal.
>
> "4. A bill of complaint by Commonwealth of Massachusetts setting out a cause of action under state anti-trust act was on its face a suit arising under state law, not under federal constitution or laws, and was not removable to federal court though purposes of state anti-trust act were similar to federal act, and though defendants attempted to show that interstate and foreign commerce and admiralty jurisdiction were involved."

When the case finally was returned to the State of Massachusetts for trial and following many preliminary proceedings to test the right of the state court to try the issues, an injunction was granted. The union asserted that the regulations at issue were necessary in order to "improve working conditions and to receive a fair share of the profits of our labor commensurate with the dangers and hardships of our occupation." The court answered the foregoing argument as follows:

> "We cannot agree with the defendants' argument that they have done nothing more than engage in ordinary labor union activities for the purpose of improving their economic condition. *Doubtless their ultimate purpose was to improve their economic condition, but that is the purpose of all persons who engage in mo-*

nopolistic enterprises. The defendants' method of first bringing into their combination practically all the fishermen and then using the control over the supply of one of the necessaries of life which this gave them directly and intentionally to reduce the supply and to raise the price is hardly the conventional pattern of labor union activity." (Emphasis ours.)

The defendants also contended that the State courts had no jurisdiction of the controversy since interstate and foreign commerce were involved. In answer to this claim, the court made the following statement:

"We assume without discussion that the operations of the defendants as fishermen occur to a considerable degree in the stream of interstate or foreign commerce both because of the sale and transportation of a substantial portion of the product to other States after it is landed, and because the product comes from the high seas (The Abby Dodge, 223 U. S. 166, 32 S. Ct. 310, 56 L. Ed. 390), and we further assume that the restraints imposed by the defendants affected that commerce in addition to their effect upon intrastate commerce. But we are not yet convinced that the State anti-monopoly law has been entirely superseded except in that narrow class of cases in which a monopolistic practice has little or no effect upon interstate commerce. To the best of our knowledge most of the States have constitutional provisions or statutes on this subject, many of them adopted subsequently to the Sherman Act. These enactments are outgrowths of long established common law doctrines and were designed to extend and adapt those doctrines to the needs of the time and locality as seen by the local law making bodies. These needs still exist, notwithstanding the Sherman Act. Monopolies and restraints of trade are of infinite form and variety. They range in extent and importance from that which is inconsequential to that which is of the utmost con-

sequence. Some expend their effects almost wholly upon intrastate commerce and are of only local interest and some almost wholly upon interstate commerce and so become matters of national concern, and there are all gradations between. In many cases it would be very difficult to draw the line. If State laws have no force as soon as interstate commerce begins to be affected, a very large area will be fenced off in which the States will be practically helpless to protect their citizens without, so far as we can perceive, any corresponding contribution to the national welfare. See Duckworth v. State of Arkansas, 314 U. S. 390, 394, 62 S. Ct. 311, 86 L. Ed. 294, 138 A. L. R. 1144. Especially is this true in view of the immense broadening in the conception of interstate commerce in recent years. In general, the purposes of the State and the Federal laws are the same. Certainly that is true of our statute, and the Sherman Act. If there should be conflict between the State law and the Federal law, the Federal law would of course prevail whenever interstate commerce was involved. A state court should be thoroughly convinced before it abandons jurisdiction over subjects that historically have been within the competence of the State, lest it discover later that it has retreated where the Federal government will not advance and has therefore been derelict in its duty. * * * It is enough for the present that there are cases which give us reason to think that the Federal and State laws may operate together, even if in some aspects a monopoly which violates State law also tends to restrain interstate commerce. * * *"

The defendants next raised the point that the State court has no jurisdiction since a labor dispute involving interstate commerce was at issue within the contemplation of the National Labor Relations Act and that, therefore, jurisdiction was solely with the National Labor Relations Board. This defense was discussed by the court at page

764. The court very properly noted that there was no controversy concerning terms or conditions of employment as such, even though the result of the improper action might be to increase the earnings of the fishermen. The contention that the State lacked jurisdiction since the controversy came under the Federal admiralty statutes was rejected for the reason that all of the activity with which the case was concerned occurred within the State and upon the land of Massachusetts. We commend the court to a reading of this particular case since, although we have attempted to quote extensively from the court's opinion, there is much contained therein which would be of interest to any court considering the present issue.

A companion case to the foregoing is *McHugh vs. U. S.*, 230 Fed. 2 252, cert. den. 351 U. S. 966. The union and five business agents who were involved in the state court case were charged with a criminal conspiracy to violate the Federal anti-trust laws and were found guilty as charged. A defense that there could be no conspiracy since the employer group had not willingly acceded to the union's demands, but rather had been bullied into the agreement, was not accepted by the court.

See also *Gulf Coast Shrimpers and Oystermen's Assn. vs. United States* 236 F. 2 658, 31 LC 70,209, decided September 6, 1956, cert. den. December 3, 1956, 352 U. S. 927, rehearing den. 352 U. S. 1019. This case was a prosecution of the fishermen's association and its officers by the United States for engaging in a conspiracy in restraint of trade or commerce under the Sherman Antitrust Act to fix the price of fish, principally shrimp caught in Mississippi ports. The evidence disclosed that practically all commercial shrimp and oyster fishermen operating from Mississippi ports were members of the association and this included both captains, as well as workmen. The boats

were in some cases owned by the captain and in other cases were owned by the packers who ultimately purchased the catch. Regardless of who owned the boat, the catch was required to be sold to certain designated packers by the association and the proceeds were split between the crew, the captain and the owner of the boat on a prescribed formula. The association fixed the price at which the catch must be sold and at which it must be purchased, and prohibited the packers to purchase from any boat save those members of the association. The evidence disclosed that the packers were invited to meetings at which the association fixed the price of the catch, but that they had little, if any, voice in the result of the meeting. In some cases the packers withheld income tax, social security and unemployment contributions from the fishermen's share of the catch. The court found that the indictment was good whether the association was a labor organization or not, since a labor organization has no Sherman Act immunity where they conspire to fix prices with a non-labor group. It also made no difference whether the conspiracy was forced on the non-labor group or whether it was acquiesced in.

In *United States vs. Fish Smokers Trade Councils*, 30 LC 70,130 and 31 LC 71,291, the Federal District Court ruled that a union could be charged under the Sherman Act of conspiring to fix prices with a non-labor group, even though the same identical matters might also be an unfair labor practice under the National Labor Relations Act.

In view of the foregoing citations of authority, can there be any argument made against the proposition that unions are subject to all of the provisions of the State and Federal anti-trust laws when they combine with non-labor groups in the formation of trusts or monopolies as prohibited in the various Acts?

STATE COURT JURISDICTION IN ANTI-TRUST CASES.

The proposition to be discussed in this section of the brief has been very generally answered by the cases cited in the foregoing section. We here wish to emphasize that the Court of Common Pleas of Summit County does have jurisdiction to prohibit by injunction the provisions of a contract entered into in Ohio which violates the State Anti-Trust Act.

We have at issue in this case a contract entered into within the State of Ohio by unions domiciled in the State of Ohio with employers who maintain offices or are domiciled in the State of Ohio. The local unions who are parties to the contracts are local autonomous bodies domiciled solely within the State of Ohio. The portion of the contract which the plaintiff claims to be in violation of the Valentine Act is concerned with the terms and conditions of the lease of vehicles. These leases will be and are executed within the State of Ohio. The contract of lease will have a situs insofar as the law applicable to the interpretation of the lease within the State of Ohio. There is not one item in any lease presented to this Court, nor is there any evidence of any requirement of any lease, which will require the leased property to leave the State of Ohio. Obviously, it may do so, but that is not a condition of the lease. See the article on contracts, Volume 12, *American Jurisprudence*, paragraph 240, page 771:

> "* * * The laws which exist at the time and place of making a contract and at the place where it is to be performed, affecting its validity, construction, discharge and enforcement, enter into and form a part of it as if they were expressly referred to or incorporated within its terms."

We refer the Court to the cases cited in the prior section of this brief, but particularly to the cases of *Common-*

wealth vs. McHugh, Dickson vs. Northeast Texas Motor Freight Lines, Inc.; State vs. Buckeye Pipe Line Co. and *Commonwealth vs. Strauss.* See also *Grenada Lumber Co. vs. State of Mississippi*, 217 U. S. 433, 54 L. E. 826, wherein it was held that the State's prohibition of a monopolistic agreement between a great number of retail lumber dealers within the State of Mississippi, in which they agreed to purchase no lumber from any wholesaler or manufacturer who sold direct to a consumer, was not contrary to any Federal statute or the Federal Constitution and was a proper decision of the State court where it violated a State anti-trust statute.

For a more recent case on this subject see *Alpha Beta Food Markets, Inc. vs. Amalgamated Meat Cutters and Butcher Workmen of North America,* decided December 31, 1956, in the California District Court of Appeals and reported at 305 P. 2 163, 31 LC 70,448. The plaintiffs, as one of a group of supermarkets contracting with the defendant on behalf of their butchers, agreed to the insertion of the following clause in their labor contract:

> "Self-Service Markets: All fresh meats, fresh poultry, fresh fish, fresh rabbits, shall be cut, prepared and packaged on the premises and dispensed by members of Meat Cutters Local."

Thereafter, as the development of the meat business into prepackaged frozen cuts grew into such a large proportion of the meat business, this particular party to the contract brought this action for a declaratory judgment under the California Anti-Trust Act to declare the aforementioned clause to be contrary to that statute, which the court so declared in the case. The court held that unions cannot combine with employers by means of bargaining contracts to prevent the sale of frozen prepackaged meats, even though the objective of the union may be to monop-

olize the work on such meat products for their own members. Such provisions and bargaining contracts are illegal and void as being in violation of the Federal and State anti-trust laws. The court further held that neither the NLRB jurisdiction over unfair labor practices nor the Federal court's jurisdiction to enforce Federal anti-trust laws deprived a state court of jurisdiction to determine the legality under State anti-trust laws of such a contract, particularly where the pleadings did not indicate that any unfair labor practice was involved as defined by the National Labor Relations Act. This is a well reasoned case and well annotated.

See also 36 *Am. Juris.* 603 (Monopolies, etc. para. 130):

> "However, a state law, as applied to a combination which restrains intrastate commerce, is not invalid by reason of the fact that interstate commerce is incidentally affected."

citing *Com. vs. Strauss* (*supra*), 191 Mass. 545, 78 N. E. 136, writ of error dismissed without opinion in 207 U. S. 599, 52 L. Ed. 358; *Standard Oil Co. vs. State*, 117 Tenn. 618, 100 S. W. 705; *Gulf C. & S. F. R. Co. vs. State*, 72 Tex. 404, 10 S. W. 81, annotated at 24 *A. L. R.* 788.

INDEPENDENT CONTRACTOR.

The evidence in this case discloses that the plaintiff leases his equipment to the defendant carriers pursuant to an arrangement which requires him to furnish the truck, to maintain it in a good state of repair, to furnish all of the expenses of the operation of the truck and to furnish a driver, for which he is compensated on either a percentage of the revenue derived from the transportation of freight or on a tonnage basis. The plaintiff hires and dis-

charges his drivers, withholds income tax, pays social security, workman's compensation and unemployment compensation for his drivers. The contract of lease provides that the relationship is that of independent contractor and not that of master and servant.

The control which the employer maintains over the plaintiff is that which is necessary to supervise the result which is sought, which is the prompt transportation of freight between terminals, and that which is necessary to require the plaintiff to comply with all of the rules and regulations of the Interstate Commerce Commission and of the Public Utilities Commission, which have jurisdiction over the transportation of freight by the employer.

This section of the brief is concerned with the claim made by the union that Revel Oliver is an employee and that the motor equipment owned and leased by him is a tool of his trade, such as a carpenter's hammer.

The difference between employees and independent contractors was recognized by the National Labor Relations Board prior to the passage of the Taft-Hartley Act, but since the Board's duties were to protect the rights of the working man, it tended to declare the relationship that of employer and employee in close cases, or cases of any doubt.

The Congress of the United States apparently did not agree with this interpretation and in the passage of the Taft-Hartley Act specifically included an exemption of independent contractors from the definition of "employee," in Section 2(3) (Section 152(3) U. S. C. A.).

In the first case considered by it following the passage of this particular section, the Board had this to say on this point, *Kansas City Star Co.* (1948), 76 NLRB 384 (I CCH La. Serv., para. 1680.06):

"The amended Act, as already noted, specifically excludes 'independent contractors' from the category of 'employees.' The legislative history, in this connection, shows that Congres intended that the Board recognize as 'employees' those who 'work for wages or salaries under direct supervision,' and as 'independent contractors' those who 'undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials and labor and what they receive for the end result, that is, upon profit.' "

We again refer the Court to the report of the House of Representatives relative to the congressional understanding at the time of the exemption of independent contractors from coverage of the LMRA, page 23, *supra*.

As is always true in the application of rules of law to facts, the Court must first determine what the relationship of the parties is before the law can be applied. In this particular case, the common law definition of "independent contractor" is applied in cases before the NLRB, but in many of the cases arising under State law, this rule varies by reason of peculiar local laws. If we make due allowance for the variations in local laws, we can draw a simple test which the Courts and Board seem to apply where they have the problem of determining whether a person is an "employee" or an "independent contractor" in the field of laws benefiting employees. Generally speaking, if the tribunal is satisfied that the true relationship has been presented to the court and that, applying common law principles, the employment arrangement is that of "independent contractor," there has been no hesitancy in so declaring the relationship. On the other hand, where the tribunal feels that the apparent appearance of such a

relationship is actually a subterfuge in order to avoid the benefits of some substantive law, the tribunal has been equally free in declaring the relationship to be that of employer and employee.

The Supreme Court held in *Stout vs. Lye,* 103 U. S. 66, 26 L. Ed. 428, that a court which has jurisdiction has a right to decide every question occurring in the cause, and in *Ward vs. Todd,* 103 U. S. 327, 26 L. Ed. 339, that once the jurisdiction of a court over both subject matter and parties has fully attached, jurisdiction continues until all issues, both of fact and of law, have been fully determined, in other words, until complete relief is afforded within the general scope of the subject matter of the action.

The Ohio courts have jurisdiction to interpret and enforce the Ohio Anti-Trust Act and have jurisdiction to make such factual decisions as are necessary in the application of that primary jurisdiction. *Allen Bradley vs. Local No. 3,* 325 U. S. 797; *Giboney vs. Empire Storage and Ice Co.,* 336 U. S. 490; *Commonwealth vs. McHugh,* 326 Mass. 249, 93 N. E. 2 751; *McHugh vs. U. S.,* 230 F. 2 252, cert. den. 351 U. S. 966; *U. S. vs. Women's Sportswear Mfg. Assoc.,* 336 U. S. 460.

In a pre-Taft-Hartley case, and under the doctrine of "free speech," independent contractors were permitted to picket and publicize their grievance in *Bakery and Pastry Drivers Local 802 vs. Wohl,* 315 U. S. 769, 86 L. E. 1178. The Supreme Court of the State of New York had held that the bakeries had a right to shift from a policy of employing driver-salesmen to employing owner-operator driver-salesmen having the status of independent contractor, where, taking a full view of the changed status, no subterfuge was involved and their true relationship was that of independent contractor. The state court had ruled that since they were independent businessmen, there

was no labor dispute and enjoined the picketing. The Supreme Court of the United States reversed solely under their then "free speech" doctrine and, of course, they were not hampered by the Taft-Hartley provision, which declares "independent contractors" not to be "employees" under the terms of the Act.

Owners-operators, similar to those involved in the pending case, were the subject of discussion in the case of *U. S. vs. Mutual Trucking Co.*, 141 F. (2) 655. This is a pre-Taft-Hartley case involving the social security tax. The discussion in the case indicates that the owner-operators operated under an agreement similar to that under which the named plaintiff in the instant case operates. The relationship was determined to be that of independent contractor, upon whose earnings no social security tax was payable. The case arose in Ohio, Ohio law was applied and Ohio cases cited. The court particularly noted that this arrangement had been in effect since 1932, so that "no question of tax evasion is involved." (See page 657.) On the question of relationship of employee or independent contractor, under the applicable Interstate Commerce Commission Regulations, the court stated at page 658:

> "The Interstate Commerce Commission recognizes operation of trucking companies through independent contract, and its auditing department reports this class of business under the heading 'Purchased Transportation.' Since the Motor Carrier Act, now part II of the Interstate Commerce Act, Title 49 USC sec. 301 et seq., 49 USCA sec. 301 et seq., covers 'all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied' Title 49, USC sec. 303 (19), 49 USCA sec. 303 (19), the present operation, so far from being condemned, is valid under federal law. The use of the plates and the form of the application therefor is

clearly explained by the necessity for complying with the regulations of the Interstate Commerce Commission."

The question of application of Social Security tax as applied to independent contractors was at issue in *Harrison vs. Greyvan Lines, Inc.*, 331 U. S. 704, 91 L. E. 1757. The court was concerned with two cases, one of which was concerned with the delivery of coal and the other the delivery of household goods over a system of nationwide rights issued by the Interstate Commerce Commission. The latter case is similar to that involved in the instant case and concerns the lessors of large tractors and trailers suitable for transportation of household goods. This case arose prior to the enactment of the Taft-Hartley Act. The case arose under the atmosphere in which the courts tended to construe the relationship of that of master and servant in order to grant as much coverage as possible for the Social Security Act, in order to effectuate the social purposes of the Act. Nevertheless, the court did determine that the relationship was that of independent contractor and the Act was not applicable.

This Court approved its prior decision in *NRLB vs. Hearst Publications*, 322 U. S. 111, 88 L. E. 1170, wherein the court rejected technical tests of independent contractors in order to broaden the coverage of the various statutes passed for the benefit of employees. (Incidentally, it was this *Hearst Publication* decision more than any other which caused Congress specifically to exempt independent contractors from the coverage of the NLRA.) In spite of the court's approval of the *Hearst* case, it nevertheless held the lessors of moving equipment to be independent contractors, and we quote the following:

"There are cases too where driver-owners of trucks or wagons have been held employees in accident suits at

tort or under workmen's-compensation laws. But we agree with the decisions below in Silk and Greyvan that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors.

"These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

The court again noted, and we wish to emphasize this point, that the leases had been in effect upon similar terms since 1930 and that no subterfuge was involved.

A decision involving owner-operators similar to Revel Oliver is involved in *Rabouin vs. NLRB*, 195 F. (2) 906. In this case the Teamsters' union struck Rabouin to require him to hire union drivers on his equipment which he leased to Mid-Atlantic Transportation Company with drivers. Employer claimed this was a secondary boycott. The court held that since, under the terms of his lease, to Mid-Atlantic Transportation Company, Rabouin was an independent contractor and the principal employer of the drivers involved, there was no secondary boycott and the picketing was against the proper employer. Since the strike was involved solely with the question of the union affiliation of the drivers and was not concerned with the terms of the lease to the transportation company, no violation of law was involved.

The following decisions have all been decided by the National Labor Relations Board and in each case the de-

termination was made that the relationship was that of employer and independent contractor.

NeHi Bottling Co., Inc., 101 NLRB 68. Twelve driver-salesmen who furnish their own trucks, hire their own helpers, select their own substitutes when they are not able to drive, who receive the difference between the cost and sale price of the beverage as remuneration, who pay their own expenses, are not carried on the employer's payroll and are not reported for employees' taxes, were independent contractors and, as such, were not included in a unit of employer.

A similar question was at issue in *American Factors Co.*, 98 NLRB 447. In this case the employer was gradually changing the relationship from employee to independent contractor. Each driver bought, or is purchasing or preparing to purchase, his own truck. He pays cash for the company's products, which he delivers and sells within an assigned territory. There is no supervision other than that he is required to sell a satisfactory amount of goods. He picks his own hours of work and pays his own operating expenses. Such persons were not included in a unit for bargaining purposes.

Malone Freight Lines, Inc., 107 NLRB 507: Owner-operators similar to Revel Oliver were held to be independent contractors. The Board cited and based its decision by comparing this contract with that presented to the court in the *Greyvan Lines* case and *Oklahoma Trailer Convoy, Inc.*, 99 NLRB 1019, and distinguished the *Nu-Car Carriers* case, 189 F. (2) 756. The Board particularly stressed the fact that the owner-operators had title to their trucks before they came to work for Malone. The Board also considered it significant that the owner-operators paid their own State license fees and taxes, hired and paid their own helpers, selected and paid their own re-

pairmen. The owners did not get vacations and other employee benefits.

Similarly, see *Eldon Miller, Inc.*, 107 NLRB 557.

In *Oklahoma Trailer Convoy, Inc.*, 99 NLRB 1019 (a representative case where the employee relationship was very similar to those in the present case), the lessors of trucks and their drivers were held not to be employees of the carrier. The lessors were held to be independent contractors and their drivers were their employees. We quote the Board at page 1023:

> "We note particularly the bona fide and absolute ownership of the trucks by the owners * * * also significant in demonstrating the true entrepreneurial nature of the owners if the fact that the *owners* determine whether to drive the trucks themselves or to employ others to do so."

The Board further noted that all of the reserved control is essential to the end to be accomplished and the observance of the rules of the Interstate Commerce Commission. See also *Sinclair Refining Co.*, 93 NLRB 1115; *Nelson-Ricks Creamery Co.*, 89 NLRB 204; *Spickelmier Co.*, 83 NLRB 452; *Jalmer Berg*, 35 NLRB 357; *Consolidated Forwarding Co., Inc.*, 117 NLRB 53, CCH LS 52,909.

In *Alaska Salmon Industries, Inc.*, 110 NLRB 145, it is interesting to note that the Board held that the operators of the company boats, as well as leased boats, were independent contractors rather than employees, where they all operated under similar contracts, hired their own crews, determined the split of the catch among their crew members, selected their own fishing spots, etc. See also *Cement Transport, Inc.*, 111 NLRB 23, LS 52,616.

An interesting case from the point of view of the case now pending is *Hoster Supply Co.*, 109 NLRB 74, in that the Labor Board, after full consideration of the facts, de-

termined that the individual had a dual capacity. He was an independent contractor as the lessor of his tractor and trailer to the employer, and an employee in his relationship as driver of the leased equipment. The facts disclosed that the employer leased the trucks and agreed to pay so much per mile for the use of the trucks and, additionally, to hire drivers and pay them a prevailing wage. In the practical operation of the arrangement, the lessee hired the lessor as the driver, but under the arrangement he could have hired any driver.

The most recent case in the particular field being briefed is that of *Arnold Bakers, Inc. vs. Strauss,* decided by the New York Supreme Court, Appellate Division, on June 4, 1956, and reported in 30 LC 70,048. At issue were driver-salesmen of bakery products. The union sought to organize these driver-salesmen and, in order to make their picketing effective, carried it out at the site of the deliveries, which were retail stores. The New York Supreme Court granted an injunction against this picketing. The union claimed that the contracts of the driver-salesmen was a device to cloak the true status of these persons. While all of the ultimate facts were not disclosed in the report of the case, the trial court found them to be independent contractors. The court further discussed the question of the jurisdiction of the NLRB and found that its jurisdiction was confined to the employer and employee relationship and, therefore, not applicable where the relationship was that of employer and independent contractor.

The effect of the cases cited in this section of our brief is as follows:

1. The tribunal having jurisdiction of the parties and of the issues has jurisdiction to determine all of the issues necessary, including that of the relationship between the parties.

2. It was the intention of Congress, in exempting independent contractors from coverage by the LMRA, to apply local common law to determine the relationship.

3. The Ohio courts properly found that Respondent Oliver was an independent contractor.

INTERSTATE COMMERCE ACT.

The petitioners also contend that the Interstate Commerce Act has preempted the jurisdiction to regulate leases to the Interstate Commerce Commission. The Interstate Commerce Act grants no general exemption from the provisions of the anti-trust laws to carriers regulated by the Interstate Commerce Commission, nor has that Commission assumed to regulate the leases of motor vehicles.

Section 5(11) of Part 1 of the Interstate Commerce Act, Title 49 U. S. C. 5(11), specifically exempts carriers from the anti-trust laws, both federal and state, in the case of mergers, unification, consolidation and control, where such has been specifically approved by the Interstate Commerce Commission.

Section 5b(9) of the Interstate Commerce Act, Title 49 U. S. C. Section 5b(9), exempts agreements entered into between carriers, which agreements have been entered into pursuant to Section 5b(2), when the agreement has been "approved by the Commission."

Section 5b(2) pertains to agreements between carriers "relating to rates, fares, classifications, divisions, allowances or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment) or rules and regulations pertaining thereto."

These are the only references to anti-trust exemption contained in the Interstate Commerce Act, as amended. By no stretch of the language of the Act can these include agreements for the lease of motor freight equipment.

It is obvious from reading the Supreme Court's opinion in *American Trucking Assn. vs. U. S.*, 344 U. S. 298, that the rules promulgated in MC-43 and approved by the Supreme Court authorized the use of independent contractors by regulated motor carriers, such as respondent carriers. See the court's opinion, page 304:

> "Since the driver of the exempt equipment is not an employee of the carrier * * *."

At page 307, the court, in commenting upon Rule 207.4-(a)(4), noted that the lease must exceed thirty days "when the driver is the owner or *his employee*."

The present effective rule of the Interstate Commerce Commission relative to the leasing of vehicles is reproduced at 21 Fed. Reg. 9653 (and at Paragraph 3381, Commerce Clearing House Federal Carrier Service). There is no rule of the Interstate Commerce Commission prohibiting the acquisition of equipment by the employment of independent contractors. On the contrary, it is this practice which is regulated and thus allowed by the rules which were at issue in the *American Trucking Association* case.

An examination of the pertinent sections of the Act Regulating Carriers by Motor Freight and the regulations of the Interstate Commerce Commission conclusively demonstrates that the aim of Congress is to regulate carriers for the protection of the public and to insure an adequate transportation system. The details of the lease of equipment as well as the type of equipment, its cost, type, location and cost of other transportation, operating, storage

and repair facilities have been left to the individual management of the carrier. So, just as a carrier may contract for the repair and maintenance of its own equipment, it may contract for the transportation of freight accepted by it—being only responsible under the law for the result and conduct thereof.

Respondent carriers submit that the Interstate Commerce Act can afford no relief to the petitioners in this case.

CONCLUSION.

Respondents respectfully submit:

1. The state court properly found that Respondent Oliver is an independent contractor and, as such, exempt as an employee from the coverage of the National Labor Relations Act.

2. The petitioners have no protected right to bargain with employers for the terms of lease of motor freight equipment for such independent contractor-lessors.

3. The courts of Ohio have jurisdiction to interpret, enforce or proscribe, as the case may require, executed contracts between labor unions and employers.

4. The courts of Ohio properly enjoined the operation of Article 32 of the petitioners' contract since it covered a non-protected subject and violated the terms of the Ohio state anti-trust laws.

Respectfully submitted,

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